IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

SOLITRON DEVICES, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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OPINION BELOW

The opinion of the Court of Claims is reported at 537 F.2d 417 and reproduced in the Appendix, *infra*. It will be cited as "App." followed by the page number of the opinion.

JURISDICTION

The Court of Claims granted the Government's "Motion for Judgment in Aid of Execution on Orders of the Renegotiation Board" on June 16, 1976. On September 8, Mr. Justice Brennan entered an order extending the time in which to file a petition for writ of certiorari until November 13, 1976. The jurisdiction of this Court rests on 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Does the Renegotiation Act authorize the Court of Claims to enter a contested "judgment in execution of orders of the Renegotiation Board" without any consideration of the merits underlying those orders?

2. If so, does the Act, to that extent, violate Article III and/or the Fifth Amendment of the United States Constitution on its face or as applied to a contractor who is solvent but cannot produce a bond in the amount of the Renegotiation Board's order less applicable tax credits?

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves §§ 1215 and 1218 of the Renegotiation Act of 1951, c. 15, 65 Stat. 7 *et seq.* as amended, 50 U.S.C. App. §§ 1211 *et seq.* and 28 U.S.C. § 2508. It also involves Article III and the Fifth Amendment of the United States Constitution. They are reproduced in pertinent part in the Appendix, *infra.*

STATEMENT OF THE CASE

A. PROCEEDINGS BEFORE THE RENEGOTIATION BOARD

Petitioner Solitron Devices, Inc. ("Solitron") is a New York corporation organized in 1959. It is engaged in the business of designing, developing and manufacturing a wide range of electronic components for the commercial, entertainment, industrial, computer, telecommunication, aerospace and defense markets.

Since 1967, Solitron has been subject to the Renegotiation Act of 1951, as amended, 50 U.S.C. App. § 1211, *et seq.* (hereinafter the "Act"). This case arises out of a proceeding to determine Solitron's alleged excessive profits subject to the Act for the fiscal years ending in February 1967, 1968, 1969 and 1970. The proceedings before the Renegotiation Board ("the Board") were

vigorously contested by Solitron which asserted that if the Act were correctly construed and applied to its business, it would not be found to have realized any excessive profits. Since the court below did not pass on the merits of the Board's determination (see App. pp. 2, 12), the bases of Solitron's disagreement need not be set forth. In the words of the court below, the ultimate resolution on the merits "involves accounting questions, and matters of judgment." (App. p. 2, *infra*).

The Board issued its orders on January 24, 1975 determining excessive profits for Solitron's four fiscal years ending in February of 1967-1970.[1] The total amount assessed was $3,868,759.00.[2]

B. PROCEEDINGS IN THE COURT OF CLAIMS

1. The Pleadings.

On April 23, 1975, Solitron filed a timely petition with the Court of Claims for a redetermination of excessive profits pursuant to § 108 of the Act, 50 U.S.C. App. § 1218.[3] On May 19, 1975, the United States filed

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[1] The order for the fiscal year ending February 28, 1967 finding an excessive profit of $491,112.00 is reproduced at Appendix B. The other orders are identical except for the change in date and amount. The February 29, 1968 order was for $1,283,413.00; the February 28, 1969 order was for $483,451.00; and the February 28, 1970 order was for $1,460,783.00. In addition the Board also assessed General R. F. Fittings, a subsidiary of Solitron, $150,000 for the period September 1, 1968 to February 28, 1969.

[2] With respect to the fiscal year 1971, the Renegotiation Board has determined that Solitron suffered a renegotiable loss of $4,200,000. Such a loss may be carried forward but never back.

[3] We shall, hereinafter, refer to the sections in the U. S. Code, in order to conform to the usage of the Court of Claims in its opinion.

an answer and counterclaim.[4] The Government requested "that the Court enter judgment for the defendant for the $3,868,759 determined to be excessive profits by the January 24, 1975 orders of the Renegotiation Board, plus such additional profits as the Court may determine, with such interest and adjustments as are provided by law; that plaintiff's petition be dismissed; and that the Court grant defendant such other and further relief as may be deemed just and proper."[5]

On the same day the government filed its "Motion for Judgment in Aid of Execution on Orders of the Renegotiation Board". The Government therein set forth the orders of the Renegotiation Board which had been entered against Solitron. It continued:

> "The plaintiff filed its petition in this case on April 23, 1975. Pursuant to section 108 of the Renegotiation Act the plaintiff had ten days after the filing of its petition within which to file a bond satisfactory to this Court to stay execution on the Board's orders. No such bond has been filed. Attached to this motion is an affidavit (Exhibit A) from the Office of Comptroller of the Army that the plaintiff has not made payments of the amounts due under the Board's orders.
>
> By this motion the defendant seeks judgments from this Court in the amount due under the Board's orders, less applicable federal income tax credits. Defendant, under the Act, is entitled to

[4] The jurisdictional basis of the counterclaim was described as follows:

> "The United States Court of Claims having jurisdiction over any set-off or counterclaim by the United States against the plaintiff herein (28 U.S.C. 1503, 2508 (1970)) in the appropriate forum in which to bring this action (50 U.S.C. App. 1215(b)(3) (1970) as amended)." Answer and Counterclaim, par. 18.

[5] *Id.* unnumbered par.

> such judgments in execution of the Renegotiation Board's Orders. *O'Brien Gear & Machine Co.* v. *United States*, 199 Ct. Cl. 1014 (1972); *Stylecraft Clothes, Inc.* v. *United States*, No. 41-74, Order of August 5, 1974."[6]

The cited cases followed *Sandnes' Sons, Inc.* v. *United States*, 199 Ct. Cl. 107, 462 F.2d 1388 (1972) (hereafter "*Sandnes'*"). The court had there held that where, after a determination of excessive profits by the Renegotiation Board, a contractor files a petition in the Court of Claims for a *de novo* redetermination pursuant to § 1218, but does not within ten days file a "good and sufficient bond" to "stay the orders of the Renegotiation Board" (*id.*), the Government is entitled to a judgment in the amount of excessive profits determined by the Board, less applicable tax credits. According to *Sandnes'*, the Government is entitled to such judgment prior to the court's redetermination of excess profits and without any inquiry by the court into the merits of the Board's order. The sole exception recognized by the court to its absolute duty to enter such an order is where the entry of judgment would make it impossible for the contractor to proceed with the litigation in the Court of Claims and its inability to make payments of the amount due under the Board's orders or to post satisfactory bond is not due to its own fault according to the strict standards set forth by the court.

The motion also set forth the Internal Revenue Service's determination of the amount of tax credits to which Solitron is entitled in connection with the Board's determinations. The Government demanded judgment on the Board's orders and the amounts of those orders less the tax credits as determined by the

[6] Defendant's Motion, etc., pp. 2-3.

IRS, plus interest commencing thirty days after the Board's orders.[7]

Solitron opposed the Government's motion, on statutory and constitutional grounds which we here summarize:

a. The court's construction of the Renegotiation Act in *Sandnes'* was incorrect. The Act does not authorize the court to enter any judgment based on the orders of the Board but requires the court to make a *de novo* determination of excessive profits prior to entering any order in favor of or against the contractor. The function of the bond described in § 1218 is to "stay" the self-help procedures set forth in § 1215(b)(1), *viz.* the direction of the Board to the Secretaries of the applicable executive departments to retain monies due the contractor under other contracts, to direct third parties to withhold monies from the contractor, and the like. Failure to file such bond leaves the Government free to exercise self-help. It does not authorize or require the Court of Claims to enter an order of its own granting judgment to the Government "in aid of execution on" the Board's order, which § 1218 treats as a nullity in the Court of Claims.

b. The *Sandnes'* construction of the Act is inconsistent with Article III of the Constitution because it thrusts on the Court of Claims (established under Article III) the non-judicial function of entering judgment based solely on the unilateral determination of the Board, which is an agency of the Executive Branch.

c. The granting of the motion would deprive Solitron of its property without due process, in violation of the Fifth Amendment, under the standards established in the "pay now-litigate later" cases such

[7] *Id.* pp. 3-5.

as *Fuentes* v. *Shevin*, 407 U.S. 67, and *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601. Solitron urged that the bare allegation that the Board had entered orders determining excessive profits to be a particular amount was a constitutionally insufficient showing of the Government's likelihood of success in the redetermination proceedings, both as a matter of law and under the circumstances of this case.

Solitron presented considerable evidence regarding its financial condition. It showed that its financial structure permits the Company to operate as a viable going business, fully capable of meeting its obligations as they become due, but that it does not have sufficient unencumbered assets (other than those which provide the minimum working capital needed for continuing operations) which it could have pledged as collateral for a bond in excess of 2.5 million. Solitron averred on the basis of an opinion of its independent accountants, Price Waterhouse Co. that although no technical default would arise from the Government's obtaining the judgment it seeks herein, it is doubtful that, should the Government enforce said judgment, Solitron would be in a position to realize the full values of its assets or continue as a going concern.[8] It was further shown

[8] Price Waterhouse & Co. described the situation as follows:

> "The ultimate outcome of these uncertainties cannot presently be determined. If significant additional liabilities result therefrom, the corporation may be unable to continue as a going concern because of its inability to meet such liabilities and its other debts. The accompanying financial statements have been prepared on the basis of accounting principles applicable to a going concern. Accordingly, they do not purport to give effect to adjustments that may be necessary should the corporation be unable to continue as a going concern and, therefore, be required to realize its assets and liquidate its liabilities and commitments in other than the normal course of business and at amounts different from those in the accompanying financial statements."

that the entry of the judgment would adversely affect Solitron's ability to refinance its existing debentures due in September, 1977 and/or obtain additional capital in the securities markets. An additional anticipated consequence of the entry of the judgment would be that Solitron's right to prosecute the redetermination proceeding would be hampered or eliminated—the only potential injury which *Sandnes'* had recognized as a possible defense to the Government's motion for judgment.

d. Solitron contested the Internal Revenue Service's calculations of the tax credits to which it was entitled. It asserted that in its view and that of its independent accountants it was entitled to a tax credit of $388,822 greater than that computed by the Internal Revenue Service and that the judgment sought by the Government should therefore be reduced to $2,542,967.

2. The Court of Claims' Decision.

The Court of Claims, sitting *en banc*, granted the Government's motion. The court reaffirmed the statutory interpretation of *Sandnes'* (App. pp. 4-5) and rejected Solitron's constitutional arguments. As the concurring judges said: "The majority opinion does not squarely address Solitron's Article III defense" (*id.* p. 12). In passing on the due process claim, the court drew from this Court's decisions the following test:

> "We think an Act is facially constitutional if it is in that class and if it authorizes a temporary deprivation of property without a hearing, but permits the ultimate making whole of the debtor in case he prevails in the due process hearing ultimately provided. Any exception must be in the instance of some extraordinary hardship as in

> *Shapiro's* case [*Commissioner* v. *Shapiro*, 424 U.S. 614] irreparable because victory in an ultimate trial manifestly would not make him whole. This is nearly the formula the majority had in mind in the *Sandnes'* case." (App. pp. 10-11)

With reference to *North Georgia Finishing, supra,* the court said that the Renegotiation Board's "orders are at least more than a private creditor's *ipse dixit*" (*id.* p. 10), and that the Board's opinions in this case "are at least facially reasonable, not bearing the indicia of bias and prejudice, nor appearing the work product of an kangaroo court" (*id.*)[9]

The court concluded:

> "Accordingly, defendant's motion for judgment in aid of execution is granted. The tax credit computations furnished by the Internal Revenue Service must be used. If they are wrong, this can be corrected in the final judgment."

It entered judgment for defendant as prayed, totalling $2,931,849.40, plus interest (App. p. 12). Judge Bennett, joined by Judge Kunzig, filed a concurring opinion addressed to the Article III issue.

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[9] The court determined that any injury arising out of the granting of judgment was due to management's failure to plan adequately for the contingency of an adverse Renegotiation Board order, and therefore did not justify withholding of judgment under *Sandnes'* (*id.* at 11; see also *id.* at 3-4, 6-7).

REASONS FOR GRANTING THE WRIT

THE COURT OF CLAIMS HAS DECIDED AN IMPORTANT QUESTION OF STATUTORY CONSTRUCTION IN A MANNER WHICH CONFLICTS WITH A CONTROLLING DECISION OF THIS COURT, AND WITH ACCEPTED PRINCIPLES OF STATUTORY CONSTRUCTION AND THE LIMITATIONS ON JUDICIAL POWER DECLARED IN ARTICLE III AND THE FIFTH AMENDMENT OF THE CONSTITUTION.

I. The Court of Claims' Interpretation of the Renegotiation Act Is Incorrect.

A. In *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 23-24, this Court described the statutory scheme after proceedings before the Renegotiation Board have run their course:

> "There is no limitation or denial of the contractor's normal litigation rights when the renegotiation process is at end. The contractor may institute its *de novo* proceeding in the Court of Claims, unfettered by any prejudice from the agency proceeding and free from any claim that the Board's determination is supported by substantial evidence. There the usual rights of discovery are available. And there the parties are not bound by a prior determination made at any level of the Renegotiation Board structure. 50 U. S. C. App. § 1218. That proceeding is the judicial remedy at law provided by the Renegotiation Act and is adequate protection against injury. Note, 41 Geo. Wash. L. Rev. 1072, 1084 (1973). We note that a contractor does not become obligated to remit excessive profits until termination of the Court of Claims suit, if it elects that course. The injury suffered, absent an injunction, is no more than the risk of being unsuccessful in the *de novo* bargaining process and the incurrence of the expense incident to renegotiation." (footnote omitted)

The Court of Claims' interpretation of the Renegotiation Act is wholly inconsistent with the foregoing.

Under that court's judgment the contractor was deemed "obligated to remit [what the Board had determined to be its] excessive profits" *before* "termination of the Court of Claims suit" (*id.*), indeed, at its very inception. Although this Court construed § 1218 as providing—in accord with its clear language—that "there" (referring to the Court of Claims) "the parties are not bound by a prior determination made at any level of the Renegotiation Board structure," that court has here given "judgment in aid of execution on orders of the Renegotiation Board" treating those orders as conclusive of the amount due. Thus, the judgment entered below is, contrary to *Bannercraft,* a most severe "limitation" of "the contractor's normal litigation rights", for, this side of Wonderland such rights normally entail an opportunity to litigate the merits before, not after, a substantial money judgment is entered.[10]

B. The decision below is incorrect even as a matter of first impression.

1. We first, of course, address the language of the Act. No provision of the Act by its terms requires the Court of Claims to enter a "judgment in aid of execution on orders of the Renegotiation Board". Section 1215(b)(3) provides that "actions on behalf of the United States may be brought in the appropriate courts of the United States to recover" excessive profits from the contractor or persons directed to withhold from him (see App. p. 4, *infra*). But an authorization to one party to sue another to recover monies does not

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[10] But see, L. Carroll, *Alice in Wonderland,* c. 12: "No! No! Sentence first—verdict afterwards." Even in the celebrated case there reported, a trial of sorts was conducted *before* the sentence. See *id.,* c. 11 and 12.

establish that the suing party is automatically entitled to judgment in its favor, and a grant of jurisdiction to a court is normally construed to grant power to decide the case for, or against, the party bringing the action.[11] As this Court held in *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329:

> "A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." (*Id.* at 329) [12]

The Court of Claims' opinions do not address this point; indeed, the *Sandnes'* opinion, which was followed herein, does not even mention § 1215(b)(3). Rather, the court's construction was derived by "an obvious negative pregnant" which, as noted, is the provision which grants jurisdiction to the Court of Claims to make a *de novo* determination of the amount, if any, of excessive profits due. The sentence relied upon here and in *Sandnes'* is the following:

> "The filing of a petition under this section shall operate to stay the execution of the order of the

[11] Where the court is one created by Article III of the Constitution, that result is, in our view, constitutionally compelled. See pp. 17-21 *infra.*

[12] In *Hecht,* this Court construed § 205(a) of the Emergency Price Control Act of 1942 (56 Stat. 23) which granted the OPA Administrator authority to apply to a court for an order enjoining violations of the Act and provided that upon a showing of such a violation "a permanent or temporary injunction, restraining order, or other order shall be granted without bond." It was held that notwithstanding the direction "shall be granted", the court to which application is made was empowered to withhold the relief sought by the Administrator.

> board under subsection (b) of Section 105 [50 U.S.C.App. § 1215(b)] only if within ten days after the filing of the petition the petitioner files with the Court of Claims a good and sufficient bond, approved by such court, in such amount as may be fixed by the Court."

From this the court below reasoned as follows:

> "Plaintiff notes the stay provision in Sec. 1218 which cross references to Sec. 1215(b) and the 'execution of the order of the Board' as the thing stayed. It argues that this means the Sec. 1215 (b)(1) withholding procedure. However, suit under Sec. (b)(3) is also 'execution' under Sec. 1215(b) and that such suits are 'execution' is also shown by the fact that parties ordered to withhold from the contractor under Sec. 1215(b)(1) may also be sued. Plaintiff would reach an absurd result with the effect of the bond apparently being only to stay collection by means other than suits and not to stay suits. The effect of the bond clearly is to stay collection by any means, and by an obvious negative pregnant, with no bond, collection by any available means, including suits but not limited to suits, is not stayed." (App. pp. 4-5)

See also *Sandnes',* 462 F.2d at 1390-1391.

Since this petition is not, of course, a full-dress argument on the merits, we shall assume, arguendo, that the court was justified in treating § 1218 as referring to § 1215(b)(3), so that in the absence of a bond, "collection by any available means, including suits but not limited to suits, is not stayed". But even this assumption merely begins the inquiry, for the court must then ascertain the meaning of subsection (b)(3) in order to determine its role when the Government seeks to collect thereunder. In other words, assuming that the filing of a bond stays the Government from bringing

a suit to collect under § 1215(b)(3), and the contractor's failure to file a bond permits the Government to bring such a suit, it does not follow, "by an obvious negative pregnant" or otherwise, that the court in which such suit is brought may, solely on the basis of the Board's order, enter judgment for the Government in the amount which the Board had determined.[13] As we have seen, that result derives no support from § 1215(b)(3) (which we note, neither uses the word "execution", nor refers to the order of the Board). And the court's result undermines the basic purpose of § 1218 to provide a *de novo* proceeding wherein the contractor is "unfettered by any prejudice from the agency proceeding and free from any claim that the Board's determination is supported by substantial evidence" (*Bannercraft, supra,* 415 U.S. at 23).[14]

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[13] Of course, if no petition for review is filed, the Board's determination becomes final and binding on the contractor; the contractor would then have no defense on the merits to a suit by the Government under § 1215(b)(3) and it would be entirely consistent with the statute, and the court's judicial function (see *Pope* v. *United States,* 323 U.S. 1, 12), for it to enter judgment in the amount of the Board's order. So, too, with an order of the Court of Claims if suit for recovery is brought after redetermination.

[14] In *Sandnes'* the court below relied on cases which it understood to have held that the district courts were obligated to enter judgment for the United States to enforce the Board order pending redetermination, when that role was vested in the Tax Court, 462 F.2d at 1390. But the course of decision was far less uniform than the *Sandnes'* opinion suggests. Indeed, *United States* v. *Miller,* 111 F.Supp. 368 (E.D. Mich.), squarely held that the Renegotiation Act does not authorize a court to enter a judgment against a contractor without a determination of the merits where, as here, the contractor has instituted a proceeding for a redetermination in the appropriate tribunal. And the only appellate case cited postponed decision of an appeal from a summary judgment entered for the government in a suit for excess profits pending conclusion of the proceedings under the Renegotiation Act.

2. A further obstacle to the court's interpretation of the Renegotiation Act is 28 U.S.C. § 2508, which provides that if "upon the whole case it [the court] finds that the plaintiff is indebted to the United States it shall render judgment to that effect, and such judgment shall be final and reviewable." Yet, in this case the court rendered a judgment in favor of the Government while the plaintiff's claim was still pending. When this point was first raised in *Sandnes',* the Court of Claims stated that the "general language [of 28 U.S.C. § 2508], enacted long before we had renegotiation jurisdiction, must yield to specific language enacted especially for renegotiation cases" (462 F.2d at 1391). The fatal flaw in this analysis is in its premise: as we have shown, there is no "specific language" in the Renegotiation Act which requires the entry of judgment for the Government before consideration of "the whole case". And the circumstance that the Renegotiation Act gave the Court of Claims jurisdiction when 28 U.S.C. § 2508 was on the books, also noted in *Sandnes',* brings directly into play the reasoning approved in *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 134:

> "A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be recon-

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Marie and Alex Manoogian Fund v. *United States,* 212 F.2d 369, 370 (C.A. 6). Two other district court cases cited in *Sandnes'* reluctantly assumed an obligation to enter judgment for the government, but for aught that appears without being presented with any contrary construction of the Act, *United States* v. *Hopkins,* 95 F.Supp. 14 (N.D. Ohio); *United States* v. *Clark,* 72 F.Supp. 393 (D.Oregon). Only *United States* v. *Shanaman,* 123 F.Supp. 402 (E.D.Pa.) was a square holding in support of the Government's right to a judgment while redetermination proceedings are pending.

> ciled. . . . This principle rests on a sound foundation. Presumably Congress had given serious thought to the earlier statute, here the broadly based jurisdiction of the Court of Claims. Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end. . . ."

There being no "positive repugnancy" between § 1215(b)(3) or any other provision of the Renegotiation Act on the one hand, and 28 U.S.C. § 2508 which governs the granting of judgment to the United States on its counterclaim on the other, it must be presumed that Congress intended § 2508 to apply when it granted redetermination jurisdiction under § 1218 of the Renegotiation Act to the Court of Claims. Indeed, that reading is the one which best harmonizes with the purpose of the jurisdictional grant, see pp. 10-14 *supra*.

3. A final ground for preferring petitioner's interpretation of the Renegotiation Act is that it alone complies with the long-standing rule that "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality" (*Machinists* v. *Street*, 367 U.S. 740, 749). Of the many occasions on which this canon of construction has been applied, *Crowell* v. *Benson*, 285 U.S. 22, is particularly apposite, for there Chief Justice Hughes construed the Harbor Workers' Compensation Act (of 1927) so as to avoid potential conflict with both the Due Process Clause (*id.* at 45-46)[15] and the judicial power of the United States (*id.*

[15] "Moreover, the statute contains no express limitation attempting to preclude the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted." (*Id.* at 46)

at 54-62). Another instance squarely in point is *Greene* v. *McElroy*, 360 U.S. 474, 507-508:

> "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, e.g., *The Japanese Immigrant Case*, 189 U.S. 86, 101; *Dismuke* v. *United States*, 297 U.S. 167, 172; *Ex parte Endo*, 323 U.S. 283, 299-300; *American Power Co.* v. *Securities and Exchange Comm'n*, 329 U.S. 90, 107-108; *Hannegan* v. *Esquire*, 327 U.S. 146, 156; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49. Cf. *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337; *United States* v. *Rumely*, 345 U.S. 41. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition."

If the Renegotiation Act is to be construed in the direction of constitutional policy"[16]—that the judiciary should be independent, and that parties are entitled to a hearing before a money judgment is entered against them—the judgment may not stand.

II. As Construed Below, the Renegotiation Act Is Unconstitutional.

A. *Article III.* In *Glidden Co.* v. *Zdanok*, 370 U.S. 530, this Court held that the Court of Claims is a court created under Article III. As such, it may perform only judicial functions, see, *e.g.*, *Muskrat* v. *United States*, 219 U.S. 346 (1911); *Keller* v. *Potomac Electric Power Company*, 261 U.S. 428, 444 (1923). While

[16] *United States* v. *Johnson*, 323 U.S. 273, 276, quoted with approval in *Regional Rail Reorganization Cases*, 419 U.S. 102, 134.

the demarcation between impermissible legislative or administrative functions and judicial functions is not always crystal clear, it has long been understood that "[a] judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end." *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226. Yet, under the construction of the Renegotiation Act adopted below, the Court of Claims takes as conclusive the factual and legal determinations of the Renegotiation Board as to the amount of excessive profits in entering a judgment against the contractor. And the court also, for reasons nowhere explained, treats as conclusive the Internal Revenue Service's calculations of the tax credits to which the contractor is entitled in computing that judgment. This is plainly not "the regular course of legal procedure" (See *Tutun* v. *United States*, 270 U.S. 568, 577). And it is in sharp contrast to the situation described in *Pope* v. *United States*, 323 U.S. 1, where "the court is called on to sanction, by its judgment, an alleged obligation in a proceeding in which the existence, validity and extent of the obligation, the existence of the data, and the correctness of the computation may be put in issue." (*Id.* at 11. See also *id.* at 11-12.)

United Steelworkers of America v. *United States*, 361 U.S. 39, presents an instructive comparison. That case involved the constitutionality of § 208 of the Taft-Hartley Act, 29 U.S.C. § 178, which provides in pertinent part that if, in an action by the United States, brought after a report by a Presidential board of inquiry (see §§ 206 and 207 of the Act), the district court

> "finds that * * * [a] threatened or actual strike or lockout—

> "(i) affects an entire industry or a substantial part thereof engaged in trade, * * * ; and
>
> "(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lockout, or the continuing thereof, and to make such other orders as may be appropriate."

The union contended that § 208 violates "the constitutional limitation prohibiting courts from exercising powers of a legislative or executive nature, powers not capable of being conferred upon a court exercising solely "the judicial power of the United States." *Keller* v. *Potomac Elec. Power Co.*, 261 U.S. 428; *Federal Radio Comm. v. General Elec. Co.*, 281 U.S. 464." (361 U.S. at 43.) This Court disagreed. An essential element of its conclusion was:

> "The availability of relief, in the common judicial form of an injunction, *depends on findings* of fact, to be judicially made. Of the matters decided judicially, there is no review by other agencies of the Government." (*Id.*, emphasis added.)

But whereas § 208 expressly calls for the district court to make the essential findings giving rise to the public right which the Taft-Hartley injunction vindicates, the Renegotiation Act, as construed below, requires no such findings before judgment is entered for the United States. On that view the Act raises the same constitutional problem which would have been presented if the Taft-Hartley Act had authorized the Presidential board of inquiry to make the critical findings, and had required the district courts to issue an injunction against a strike or lockout on the basis of the board's findings.

The paucity of precedent directly in point reflects not the infirmity of the constitutional principle which

we invoke, but Congress' historic respect for the independence of the Judiciary. But when, in the aftermath of the Civil War, Congress sought to direct the outcome of pending litigation, in the guise of regulating the jurisdiction of this Court and the Court of Claims, the statute was struck down:

> "The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the court of claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the judicial department of the government in cases pending before it?
>
> We think not. * * * We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.
>
> It is of vital importance that these powers be kept distinct."

United States v. *Klein*, 13 Wall. (80 U.S.) 128, 146-147.[17]

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[17] See also Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1373 (1953):

> "On the other hand, if Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it. Rutledge makes that point clearly in [*Yakus* v. *United States*, 321 U.S. 414, 463-468 (dissenting opinion)], as the Court itself made it clear long ago in *United States* v. *Klein*, *supra*. That's the reason, isn't it, why Hughes invokes Article III as well as the Fifth Amendment in *Crowell* v. *Benson* [*supra*]? As he says, the case was one 'where the question concerns the proper exercise of the judicial limitations'." (Emphasis in original, footnote omitted)

In the present case, the Court of Claims has construed the Renegotiation Act as requiring that court to enter judgment on a determination of the Renegotiation Board—an agency of the Executive Branch, rather than by direction of Congress. But this is a distinction without constitutional significance, for Article III preserves the separation of powers between the Judiciary and the Executive no less than between the Judiciary and the Legislative Branch. While, as we have acknowledged, there is no precedent precisely in point, the unconstitutionality of the Act as construed below should be clear. What would this Court say to a law which required the courts to enforce an order of the National Labor Relations Board without examining (even on some limited standard of review) the factual and legal basis of that order?

B. *Fifth Amendment.* In *Commissioner* v. *Shapiro*, 424 U.S. 614, 629, Mr. Justice White wrote:

> "This Court has recently and repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made."

Here the court below entered a judgment against Solitron for almost $3,000,000 without any hearing pending

final adjudication in the redetermination proceeding. Neither this result, nor the Court of Claims' statement of the rule (App. p. 10, quoted at pp. 8-9, *supra*) can be squared with *Shapiro* or the decisions there cited, 424 U.S. at 629-630, n. 11.[18] And the Renegotiation Board's record in the courts shows that it is highly improbable that the Board's order would ultimately be found valid or increased.[19]

The court below erred further in treating the Renegotiation Board's order as an acceptable substitute for the showing of "probable validity of the deprivation" required by the Constitution.[20] The Court thereby

[18] *Shapiro* itself was not a constitutional decision but rather applied to the Anti-Injunction Act the canon of construction which the court below erroneously failed to apply to the Renegotiation Act, pp. 16-17, *supra*. The particular importance of *Shapiro*, in addition to its clear statement of the constitutional rule, is its recognition that that rule applies in cases where the government is seeking to collect taxes, notwithstanding *Phillips* v. *Commissioner*, 283 U.S. 589, heavily relied on in *Sandnes'*, 462 F.2d at 1392-1393. See 424 U.S. at 630-633; see also *Laing* v. *United States*, 423 U.S. 161, 185 (Brennan, J. concurring).

[19] In 186 cases disposed of in the Tax Court or the Court of Claims either by stipulation of the parties or by the court's redetermination, the amount determined by the Board was decreased in 147, increased in 6 and left unchanged in 33 cases. Twentieth Annual Report of the Renegotiation Board, p. 15 (1975).

[20] The purpose of these procedural protections is to "guard against the risk of initial error" that would cause the debtor to suffer irreparable injury while the validity of the creditor's claim is litigated. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 608. To prevent such initial error in prejudgment deprivation of a debtor's property, a creditor is required to establish the probable validity of his claim. *Mitchell* v. *W. T. Grant Company*, 416 U.S. 600, 609; *Di-Chem, supra*, at 611-12 (Powell, J. concurring); *cf. id.* at 607. A deprivation of property based only on information supplied by the creditor can, given other procedural protections (see *infra*), be appropriate where the issues are "uncomplicated matters that lend themselves to documentary

violated the express prohibition of § 1215(a) of the Act that the Board's statement of its determination "shall not be used in the Court of Claims as proof of the facts or conclusions stated therein", disregarding the fundamental difference between the renegotiation procedure and an adversary hearing which Congress drew, particularly in §§ 1215(a) and 1218, and which underlies the decision in *Bannercraft, supra*. The decision below departs from the constitutional standard declared in *North Georgia Finishing* v. *Di-Chem, Inc.*, 419 U.S. 601, also in its appraisal of irreparable injury.[21] The proposition that a medium-sized company such as Solitron can without irreparable injury to its business satisfy even a temporary judgment for $3,000,000 defies commercial reality.

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proof." *Mitchell, supra*, 416 U.S. at 609. But the issue of probability of success in a renegotiation proceeding requires careful analysis of complicated financial and accounting data. To determine the existence *vel non* of excessive profits, the court must consider, *inter alia*, reasonableness of costs and profits, 50 U.S.C. App. § 1213(e); net worth, *id.;* extent of risk assumed by debtor, *id.;* nature and extent of contribution to the defense effort, *id.;* character of the business, *id.;* and accounting methods employed, 50 U.S.C. App. § 1213(i).

[21] Compare App. p. 11 ("We are not dealing with the installment buyer of a TV set he cannot afford. We are dealing with a publicly held company, considered responsible enough to be awarded millions worth of defense contracts over many years.") with *North Georgia Finishing*, 419 U.S. at 608 ("It may well be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error. We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause.")

III. The Questions Presented Are of Exceptional Public Importance.

The Court of Claims' construction of the Renegotiation Act jeopardizes the financial condition of every contractor against whom the Renegotiation Board has rendered a substantial excessive profits determination, but who is unable to post a "good and sufficient bond" which, in practice is a bond in the amount of that determination less tax credits as determined unilaterally by the IRS. For the reasons stated in part I of this petition, we submit that this construction deprives government contractors of the full benefit of the *de novo* proceeding established by Congress. Moreover, the effect of the Court of Claims' decision is not limited to contractors in Solitron's position; it will inevitably affect the entire renegotiation process.

The prospect of execution by the Government pending completion of the proceedings in the Court of Claims will enormously enhance the Government's bargaining power in the renegotiation proceedings (cf. *Bannercraft, supra,* 415 U.S. at 21-22), giving a weapon which Congress did not place in its amory. The force of this weapon is greatly enhanced by a paradoxical consequence of the court's interpretation: The greater the amount of the Board's determination, the more difficult it becomes for the contractor who has filed for review under § 1218 to avoid execution by putting up cash or a bond in the amount of the determination, less tax credits. Thus, the more the Board errs in the direction of increasing the award, and thus, the greater the possibility that that award will ultimately be reduced by the court in its *de novo* redetermination, the greater is the likelihood that the contractor will be forced to compromise with the Government without completing

the review proceedings or that he will face irreparable injury from a "judgment in aid of execution" of the Board's order.

The intrinsic importance of the constitutional questions requires little elaboration. The apparent failure of the court below to understand and implement the due process principles which this Court has recently declared evidence the need for further elucidation of the rights of parties whose property is sought to be taken by the order of a court. The continued insistence of the United States in renegotiation and tax cases that the due process rules declared by this Court should be diluted when it is trying to protect the revenue lends further urgency to the present case. And surely this Court has a unique responsibility to assure itself that the lower courts have not unwittingly surrendered their independence by placing the imprimatur of a judicial judgment on an unreviewed order issued by the Executive Branch.

CONCLUSION

By reason of the foregoing, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

In the United States Court of Claims

No. 133–75

(Decided June 16, 1976)

SOLITRON DEVICES, INC. v. THE UNITED STATES

Seymour Glanzer, attorney of record for plaintiff. *Dickstein, Shapiro & Morin*, of counsel.

Marvin L. Coan, with whom was *Assistant Attorney General Rex E. Lee*, for defendant. *John H. Broadley* of counsel.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*, *en banc*.

DEFENDANT'S MOTION FOR JUDGMENT IN AID OF EXECUTION ON ORDERS OF THE RENEGOTIATION BOARD

NICHOLS, *Judge*, delivered the opinion of the court:

We have before us another variation on the theme of the rich but impecunious government contractor who has realized and should refund excessive profits, at least according to orders of the Renegotiation Board, but who cannot stay enforcement of the orders because of inability to obtain a bond. It is one of the paradoxes of our time. We convened an *en banc* court to consider the case because of the possibility we might be obliged to overrule or modify our decision in *Sandnes' Sons, Inc.* v. *United States*, 199 Ct. Cl. 107, 462 F. 2d 1388 (1972). However, we find no occasion to do so. The list of cases involving the same problem also includes *O'Brien Gear & Machine Co.* v. *United States*, 199 Ct. Cl. 1014 (1972); *Bannercraft Clothing Co.* v. *United States*, 207 Ct. Cl. 199,

518 F. 2d 605 (1975); *Manufacturers Service Co.* v. *United States*, 207 Ct. Cl. 185, 518 F. 2d 1202 (1975). This is the first case since *Sandnes'* in which the working of the statute, as constructed in *Sandnes'*, is asserted to violate the Constitution.

Solitron Devices, Inc. (Solitron) is a publicly held company. Its securities are traded on the American Stock Exchange. It is a New York corporation with a principal place of business in Tappan, New York. It is in the electronics business and has several manufacturing facilities, both in this country and abroad. General R. F. Fittings, Inc., was a wholly owned subsidiary but in 1971 became a division of Solitron, and is included in any reference to the parent unless the context indicates otherwise. Solitron, so far as the instant case is concerned was engaged in the manufacture of electronic components such as rectifiers, transistors and diodes. Part of this was defense business, subject to the Renegotiation Act of 1951, as amended, 50 U.S.C. App. Sec. 1211, et seq. (Act), but the correct allocation of sales and costs to such business is in dispute. Solitron does not deny that some at least of its contracts and purchase orders carried the notice prescribed in 50 U.S.C. App. Sec. 1214. It does assert that if the Act were correctly construed and applied to its business, it would not be found to have realized any excessive profits as defined in the Act. This, however, involves accounting questions, and matters of judgment, and must be put before our Trial Division on the merits of the case.

The Renegotiation Board commenced renegotiation with respect to Solitron's fiscal years ended February 28, 1967, February 29, 1968 and February 28, 1969 and 1970 (four years) and by orders dated January 24, 1975, determined that Solitron realized excessive profits of $491,112, $1,283,413, $483,451 and $1,460,783 respectively. A separate order assessed General R. F. Fittings for $150,000 for a short year. September 1, 1968 to February 28, 1969. These figures are large reductions from those the Regional Board originally had recommended, so it would appear Solitron was at one time menaced with exactions that greatly exceeded the orders now before us. The figures allow for state taxes but are before adjustment for Federal income taxes.

Solitron has filed its statutory petition in this court to obtain our redetermination of its excessive profits, under the Act Sec. 1218, as amended, alleging it realized no excessive profits. But it has not filed the bond to stay execution of the Board orders. It says it cannot obtain one, or if it could, it would only be by furnishing such collateral that it would be unable to continue business. Defendant has, according to its usual practice, counterclaimed for the amounts of the orders. It has collected a little of them but relatively not much, by other collection measures the Act authorizes. The motion before us now is for judgment in aid of execution. If recovery is had on such a judgment, according to our decision in *Sandnes'*, *supra*, it will not prevent Solitron from continuing to prosecute its litigation here, and if successful, it could of course recover with interest refunds to the extent necessary to effectuate our redetermination.

Solitron realized a renegotiable loss of $4,200,000 in its fiscal 1971, which could not be carried back to the renegotiated years. It paid dividends until the end of its fiscal 1973 year. Its 1971, 1972 and 1973 dividends distributed over $1,000,000. It has repurchased its own debentures. It has invested in real estate. Its working capital February 28, 1975, was $3,761,000 but cash was only $474,000. In Barron's of March 29, 1976, we find its stock listed at 4¼ high, 3⅜ low. We have not attempted to analyze the financial statement furnished in detail.

It seems clear that renegotiation must have been visible as a cloud on the horizon in fiscal 1967, when the first statutory notices started coming in, and the cloud must have grown steadily thereafter. Renegotiation was commenced within two years after the close of each fiscal year. It does not seem that provision was ever made to assure ability to pay renegotiation refunds, if and when determined to be due. Counsel's explanation of this obvious fact is that the company never did believe, and does not now believe, that anything was due. Management clearly must have been aware, a long time before the orders of January 24, 1975, that first the Board staff, then the Regional Board, then the top Board, were of the opinion that something was due. The financial statement (which plaintiff furnished in support of

its response) reflects that plaintiff's management is or has been in difficulty with the SEC, and has been sued by investors, because of alleged failure by management to publicize the severity of their renegotiation problems.

Because of economic conditions it may have now come about that bonds to stay renegotiation collection are obtainable only by companies that could pay the proposed refund in cash without inconvenience. And it is clear also that the impact of renegotiation includes not only companies that chose not to prepare for the day of renegotiation reckoning, but also companies that, *e.g.*, by losses in years not under review, never had the ability to pay the refund that appears fair and just from scrutiny of a profitable year or years only.

Counsel have reargued the statutory scheme and we adhere to our exposition of it, that the whole court was agreed on in *Sandnes'*. In brief, by Sec. 1215(b)(1) of the Act, upon the entry of an order the Board may authorize the Service Secretaries to collect by withholding techniques on current payments. Or by Sec. 1215(b)(3) actions may be brought in "the appropriate courts of the United States" to recover from the contractor or persons directed to withhold from him. By Sec. 1218 an entirely different action was authorized to redetermine the excessive profits *de novo*, originally in the Tax Court, now in this. And in that section it is provided that the petition for redetermination stays collection *only* if a bond is timely filed. Thus before we were brought into the picture by Act of July 1, 1971, Pub. L. 92–41, there were two entirely different court procedures in absence of a bond: to collect, in the District Court, plainly barred from redetermining or reviewing the refund determination itself, as held many times, and to redetermine, in the Tax Court, which had nothing to do with collection except as filing a bond there might stay it. Now that we are the redetermining court, the collection proceeding, in the absence of a bond is a counterclaim which is compulsory here. *See*, also *Manufacturers Service Co.*, *supra*.

Plaintiff notes the stay provision in Sec. 1218 which cross references to Sec. 1215(b) and the "execution of the order of the Board" as the thing stayed. It argues that this means the Sec. 1215(b)(1) withholding procedure. However, suit under Sec. (b)(3) is also "execution" under Sec. 1215(b) and that

such suits are "execution" is also shown by the fact that parties ordered to withhold from the contractor under Sec. 1215(b)(1) may also be sued. Plaintiff would reach an absurd result with the effect of the bond apparently being only to stay collection by means other than suits and not to stay suits. The effect of the bond clearly is to stay collection by any means, and by an obvious negative pregnant, with no bond, collection by any available means, including suits but not limited to suits, is not stayed.

Plaintiff then turns to its Constitutional argument. Insisting that in reality it owes nothing, it says we cannot constitutionally enter judgment according to the statutory scheme without some kind of due process preliminary hearing, since there was avowedly none at the Board level. The right to recover a refund after trial, if the findings establish entitlement, it says is not enough. Plaintiff is vague about what kind of preliminary court survey of the case would be sufficient. As a practical matter, in view of the judgmental nature of renegotiation, we think none would. Plaintiff is doubtless really demanding that there should be no collection at all until the processes of this court have been traversed in their entirety and presumably, until the Supreme Court has denied *certiorari*. The administrative process of determining excessive profits is not a speedy one, as this case illustrates. So far the judicial process has, alas, not been particularly speedy either. If plaintiff is right, no one would ever eliminate excessive profits by agreement. By just refusing to agree, and petitioning to this court, he could probably retain control and use of the alleged excessive profits for nearer two decades than one. If Congress believed that the option to file a bond had become wholly illusory, except for those who could pay without hardship, it might well not vote for plaintiff's procedure. Under the 1943 Act, as we pointed out in *Sandnes'*, *supra*, there was no provision for stay of collection after a final order, by bond or otherwise.

In *Sandnes'*, too, the plaintiff would have had us hold that the procedure we thought the statute required was unconstitutional as to any contractor who was unable to file a bond. A fair reading of our majority and dissenting opinions will show all thought the scheme was not facially unconstitu-

tional. The majority thought it might be unconstitutional as applied to a few exceptional Catch-22 situations, where it might lead to a petitioner being effectively "chilled" in his appeal to this court, without ever having had a due process hearing. The majority wanted to be shown that the contractor had got into its predicament without its own fault or negligence, and further, that the Government would or at least could use the judgment in a manner to prevent further prosecution of the petition in this court. The showing never was made in *Sandnes*', as the contractor never went before the Trial Division to make it, and this might have been anticipated, for the opportunity to make such a showing was not what it had sought. Three judges in dissent would have entered the requested judgment without further ado, not believing the statutory scheme could be unconstitutional as to any state of facts, or at least any suggested by the record before us.

Should we be satisfied to follow *Sandnes*' as a precedent, we would have to consider the matters we wanted to know more about in *Sandnes*'. Here we know enough to make reference to the Trial Division unnecessary. It is quite apparent that management had nine years, almost, from the time the statutory notices started coming in until the final orders, to commence making preparations for the evil day to come. However unjust they thought the demand would be, prudent management would have suggested some hedge against it. Management must prepare for the unjust as well as the just exaction. If the notices are not to warn the contractor to prepare for the blow of a Board order, it is difficult to see what purpose Congress meant them to serve. Solitron didn't even stop paying dividends until after 1973. They turned over profits many times exceeding the sums now demanded. Assuming they are now unable to obtain a bond, this would be irrelevant if they could pay the refund and continue in business. They could do this if they had taken the most obvious precautions. They are not, therefore, in the predicament they are in without their own fault or negligence, as at least a contributing cause according to their own showing here.

In *Sandnes*' we directed an inquiry (199 Ct. Cl. at 117, 462 F. 2d at 1394):

> b. Whether plaintiff's financial condition is due in any part to dividends or other distributions made from the notice of commencement of renegotiation, to now.

In *Sandnes*' the contractor was in bankruptcy. In view of this we were also uncertain what if any effect the judgment would have, surmising that like the Board order, it would simply be an item to be proved in the bankruptcy. We directed inquiry as to that point. Plaintiff here is not in bankruptcy and the possibility that our judgment could be used in a destructive way therefore has more plausibility. Plaintiff is not insolvent but we accept at least *arguendo* that if defendant had the judgment it could, if it so willed, put plaintiff in a situation of stringency for cash and working capital, and might make it unable to meet other current liabilities. It would be imprudent for the Government to do so, no doubt, as killing the golden goose, but this does not guarantee it will not do it. It would seem however, if Government really attempted at whatever cost to itself as well as to the contractor, to collect on a liability that our ultimate decision on the merits may wash out entirely, a receivership would be a good defense. Plaintiff's not being in bankruptcy or receivership means its management, so long as this state continues, could dispose of assets while the case was pending here, a factor not present in *Sandnes*'.

Assuming as the majority did in *Sandnes*', that the statutory scheme may be unconstitutional as it might be applied in a few situations where the judgment in aid of execution would have an exceptionally harsh impact and would "chill" further prosecution of the case on the merits, before any due process hearing thereon, we do not see this as such a case. In some respects, as pointed out, the situation in *Sandnes*' was more suited to give us pause, and to justify a pause for further inquiry. To avert the judgment, therefore, plaintiff must persuade us, contrary to the view of the entire court in *Sandnes*', that the statutory scheme is facially unconstitutional or at least unconstitutional as applied to every contractor who cannot furnish a bond to stay execution of the Board order. This is Solitron's backup position. It expects us to overrule

Sandnes' on the basis of changes in the "legal climate", *i.e.*, the atmosphere emanating from Supreme Court decisions dealing with "collect now, litigate later" techniques, handed down since the date of *Sandnes'*, July 14, 1972.

Commissioner v. *Shapiro*, —— U.S. ——, was decided March 8, 1976, and of course was much discussed in oral argument before us. It shows that "collect now, litigate later" has its limits even in the generally open field of Internal Revenue enforcement. Defendant had assessed taxes on Shapiro and served levies upon various banks in which he had accounts or safe deposit boxes. He was about to be extradited to Israel to be tried for fraud there, and relied on the seized funds to finance his defense and for bail money there. He had a suit pending in the Tax Court which had not been decided. The damage from the seizures would obviously not be repaired by ultimate victory in the Tax Court. The question was whether the Anti-Injunction Act, IRC Sec. 7421(a) barred Shapiro's injunction suit, with the IRS merely asserting there was a tax liability, or whether some inquiry had to be made as to its factual basis. The Government would have required Shapiro to prove there was no factual basis for the tax, not informing him what facts it had. The Court affirmed the D.C. Circuit, holding for Shapiro. The Court said that to allow the Government to seize and hold property merely on a good-faith allegation that a tax was due, would raise serious Constitutional problems when, as in Shapiro's case, the seizure would cause irreparable injury. Slip op. at p. 14.

These statements are supported by a footnote 11, citing *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); and *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), of which we had the benefit in our *Sandnes'* decision, and *North Georgia Finishing, Inc* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975), which has come down since. This latter case holds a Georgia garnishment statute unconstitutional because a writ tying up a banking account may be had at the outset of litigation just by filing a conclusory affidavit and a bond with a clerk of court or other non-judicial officer. The footnote, however, distinguishes *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), where it was held that no probable cause hearing is required where complainant will eventually be made whole for any inadequacy in compensation for confiscated property.

North Georgia Finishing, Inc., supra, likewise distinguishes *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974), where a "sequestration" statute passed constitutional muster because there the seller-creditor holding a vendor's lien could obtain the writ only from a judge who had to be satisfied by an affidavit setting forth the facts, beyond mere conclusory allegations There is much debate among the Justices, which need not concern us here, whether *Mitchell* v. *W. T. Grant Co.*, overrules *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and is in turn overruled by *North Georgia Finishing, Inc., supra.*

Defendant relies on two other recent Supreme Court tax cases interpreting the Anti-Injunction Act, IRC Sec. 7421(a), that go unmentioned in *Shapiro*, but assuredly are not to be regarded as overruled *sub silentio. In Bob Jones University* v. *Simon*, 416 U.S. 725 (1974), that Act was held to bar a suit to enjoin the IRS from removing plaintiff from the list of tax-exempt private schools. It was asserted that this would cause donors to stop contributing for fear of losing their own tax deductions, an irreparable injury that ultimate victory in the school's own tax litigation would not repair. It was held that the school could not maintain the suit because it could not bring the case within *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), *i.e.*, it could not show the Government could under no circumstances prevail. *Commissioner* v. "*Americans United*" *Inc.*, 416 U.S. 752 (1974), followed immediately after *Bob Jones* and involves similar issues. The Court says expressly that irreparable injury does not suffice to bring a case within the *Enochs* v. *Williams Packing & Navigation Co.*, exception, 416 U.S. at 762. We read these cases, with *Shapiro*, as restricting any judge-made exceptions to the Anti-Injunction Act to narrow situations of infrequent occurrence. Here, of course, we have no Anti-Injunction Act and we have legislation of some but not major impact upon the Revenue. The total inability to prevail standard would be difficult to engraft on a Renegotiation case, when so much depends on individual judgment. Of course, any issue, whether a contractor is exempt or otherwise not subject to Renegotiation

at all, can here be litigated by summary judgment at the outset of the case, as was done in *Newport News Shipbuilding & Dry Dock Co.* v. *United States*, 208 Ct. Cl. ——, 527 F. 2d 1213 (1975), wherein the contractor got a summary judgment exonerating it from Renegotiation liability for the year involved, on showing that the Board had inadvertently allowed statutory limitations to run before the date of its Order.

It seems fair to say from the recent cases that the indigence of the debtor, and the fact that the contract to be enforced was one of adhesion, have lost some of the importance we assigned to them in our *Sandnes*' discussion. On the other hand, there is no more reason than before to believe that the due process requirements engrafted on the legal remedies of private creditors will be transferred entire to the extraordinary remedies granted the Government in the enforcement of its Revenue Acts and other important monetary legislation. We think an Act is facially constitutional, if it is in that class and if it authorizes a temporary deprivation of property without a hearing, but permits the ultimate making whole of the debtor in case he prevails in the due process hearing ultimately provided. Any exception must be in the instance of some extraordinary hardship as in *Shapiro's* case, irreparable because victory in an ultimate trial manifestly would not make him whole. This is nearly the formula the majority had in mind in the *Sandnes*' case.

We do not wish to be understood, however, as holding that our judgment here will have no better foundation than the garnishment process in Georgia. The Board's orders are at least more than a private creditor's *ipse dixit*, considering the Board's statutory independence (50 U.S.C. App. Sec. 1217), the elaborate procedure it follows according to law and regulations, and its internal appeals, here very successful for the contractor. The order may not have been arrived at by due process in the traditional sense, but contractor was afforded the process which was due in the circumstances, including the availability of a full trial later on. *Cf. Flute* v. *United States*, Ct. Cl. No. 38–75 (decided May 12, 1976).

We can and have read the Board's opinions attached to the petition, and see that they are at least facially reasonable,

not bearing the indicia of bias and prejudice, nor appearing the work product of a kangaroo court. Plaintiff asserts bad faith in refusing to consider a Price Waterhouse audit submitted late in the case. The Board explains its position as to this. Whether the audit is decisive for plaintiff of course remains to be determined.

Plaintiff asserts that our function in entering the judgment in aid of execution is ministerial, unworthy of an Article III court. It was performed by District Courts before Pub. L. 92–41, *supra*, albeit with some grumbling. We have necessarily taken the case under our scrutiny to the extent indicated. On the whole, we think our pre-execution judicial scrutiny of the case will stand comparison with that under the Louisiana "sequestration" law, upheld in *Mitchell* v. *W. T. Grant Co.*, *supra*.

Thus we think the basis for departing from the statutory procedure on constitutional due process grounds clearly exists only, if at all, when enforcement of that procedure, as written, threatens a contractor with substantial injury which would not be reparable by the final judgment obtained after trial on the merits. Albeit dictum, here we will say now that *Shapiro* teaches us not to view such instances lightly when their existence is shown. This is not such a case. We are not dealing with the installment buyer of a TV set he cannot afford. We are dealing with a publicly held company, considered responsible enough to be awarded millions worth of defense contracts over many years. Though the long time consumed by the cases before the Board is apparently not unusual, we doubt if Congress contemplated that a contractor would be able to retain alleged excessive profits, interest free, as long as this one has. In the long time taken and given the size, volume, and profitability of the business, it should have been easily possible to prepare for the blow. If plaintiff is in the plight it asserts it is, its own management is largely responsible. Considering the options open to both Government and contractor, the possibility of irreparable injury is not a clear and present danger, as in *Shapiro's* case, but remote and speculative at the worst. Plaintiff may be concerned how the judgment will be received by the SEC and by its investor plaintiffs, but they all can read this opinion and see

there is not a final judgment here on the merits. If collection from plaintiff is effected, it may recover everything on final judgment, with interest as provided by law. There is no clear and convincing demonstration that this will not make it whole.

Accordingly, defendant's motion for judgment in aid of execution is granted. The tax credit computations furnished by the Internal Revenue Service must be used. If they are wrong, this can be corrected in the final judgment. Judgment is entered for defendant in the following amounts with interest as provided by law:

Fiscal Year:	
1967	$491,112.00
1968	1,283,413.00
1969	483,451.00
1970	1,460,783.00
For General R. F. Fittings	150,000.00
Less tax credits as follows:	
Fiscal Year:	
1967	$235,733.76
1968	None
1969	None
1970	Not known: Defendant stipulates maximum possible, 48%.
For General R. F. Fittings	None
Net after tax credit:	
Fiscal Year:	
1967	$255,378.24
1968	1,283,413.00
1969	483,451.00
1970	759,607.16
For General R. F. Fittings	150,000.00

BENNETT, *Judge*, joined by KUNZIG, *Judge*, concurring:

I concur in the result and in the court's opinion so far as it goes, but feel it necessary to add a few words because the majority opinion does not squarely address one of the two constitutional defenses asserted by plaintiff to defendant's motion for summary judgment in aid of execution of the orders of the Renegotiation Board entered against plaintiff.

Plaintiff correctly observes that the U.S. Court of Claims is a court created under article III of the Constitution. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 571–84 (1962). Plaintiff then refers us to article III, section 2, of the Constitution. Section 2 provides that the federal judicial power extends to all "cases and controversies" to which the United States shall be a party. But, plaintiff says that pre-hearing entry of a money judgment by this court based not upon facts and evidence, but solely upon the board's orders, would not be an act of a sufficiently judicial nature to be performed by an article III court. In other words, such a judgment would be *void* since not produced by an exercise of the judicial power of the United States. Plaintiff views the renegotiation statute as attempting to vest in the judiciary jurisdiction over matters which are purely legislative or administrative in their substance when in section 108 it would authorize issuance of pre-redetermination "judgments" in aid of execution of administrative orders. Plaintiff says that this is just not adjudication by the court of a justiciable controversy. This particular question has not heretofore been squarely addressed in a majority opinion of this court in renegotiation cases. I think we must now speak to it. Of course, it is not contested that legislative or administrative jurisdiction cannot be conferred upon article III courts. To do so would violate the doctrine of the separation of powers. The question now is whether or not that is what Congress has done here.

Plaintiff asserts that for us to enter a $2.9 million judgment against it without evidence upon which we can exercise the judicial power of the United States, indeed lacking even an administrative record, and in face of the policy of the Renegotiation Act that no presumptive validity attaches to the unilateral declarations of the Renegotiation Board, simply makes the court a rubber stamp for the board and transforms the court into an extention of the administrative processes of the executive branch. Alternatively, plaintiff suggests that if section 108 of the Act requires this court to enter a judgment on behalf of defendant in such a factual void, that section should be held to be unconstitutional "as it is patently antithetical to the concept of justiciability embodied in Article III of the Constitution." On justiciability generally, see *Baker* v. *Carr*, 369 U.S. 186 (1962).

Plaintiff's constitutional arguments are serious and two-fold. First, that to go along with defendant's demand for judgment because plaintiff has not posted the required bond would be premature and deny plaintiff due process if there is no hearing on that issue, or indeed upon all the issues presented by the pleadings. The court's opinion deals adequately with plaintiff's due process issue as it pertains to a demand for hearing before judgment in aid of execution of the board's orders. The second issue, however, which the opinion does not address, is whether the judicial power of the United States attaches at all in the present posture of the case.

We have here a peculiar statute that requires a contractor "to pay now and litigate later." But, it does provide plaintiff with the opportunity, in a de novo hearing at a later date, to show, on the merits, that the board determination was wrong and to recapture, with interest, any sums wrongly found by the board to have been excessive profits. It is in the present initial stage of the case that we have this ancillary proceeding with reference to stay of execution. As defendant suggests, this is the time for the court to inquire into whether the board's orders were entered against the proper party, whether the procedures followed in entering the board orders were lawful, whether plaintiff has paid the amount claimed by the board to be due, whether it has in fact posted the required bond to stay execution, and whether the entry of a judgment now would have a chilling effect on plaintiff's ability to litigate the de novo redetermination. The court has no problems with these factors in this case. It adheres to its prior holdings that section 108 requires the posting of a bond as a condition for stay of the orders of the Renegotiation Board and that the court is required and directed to grant a judgment in aid of execution based on those orders when no proper bond is filed without excusable cause.

As to the jurisdictional issue, this proceeding involves a justiciable case or controversy to the extent it seeks, and defendant opposes a judicial determination of the ultimate issue of excessiveness. The ancillary or collateral relief now being sought—judgment in aid of execution of the board's orders—could not be awarded in the absence of plaintiff's own petition for redetermination. We would have no jurisdiction absent

an affirmative claim for relief. In order words, plaintiff brought us a case or controversy when it filed its petition. We do not decide the merits thereof at this stage, but under the statute must go forward as it directs without prejudice to plaintiff's right and opportunity to prove to us that the board was wrong and that its profits were not excessive. The judicial power has been invoked. Yes, it is hard to have to put up the money first and litigate later. But, this statutory scheme was on the books when plaintiff took the contract with notice of it. By entering renegotiable business and by failing to provide the bond the statute requires, plaintiff, in my view, has waived the right to any hearing on the merits of the excessiveness issue prior to execution of the board's orders. Also, the Supreme Court has sanctioned the constitutionality of the pay now, litigate later scheme in upholding unilateral revenue determinations similar to the scheme in the Renegotiation Act, where adequate opportunity is afforded for a later judicial determination of the legal rights. *Phillips* v. *Commissioner*, 283 U.S. 589, 593–95 (1931). Of course, there is room for argument that the basic purpose of the Renegotiation Act is not to gather revenue, if that makes any difference, which I think not. *Sandnes' Sons, Inc.* v. *United States*, 199 Ct. Cl. 107, 462 F. 2d 1388 (1972). But, plaintiff cannot complain when it has not convinced the court that it cannot put up the bond to stay execution. *Cooper-MacDonald, Inc.* v. *United States*, Ct. Cl. No. 88–75, 207 Ct. Cl. —— (Order, Oct. 3, 1975); *O'Brien Gear & Machine Co.* v. *United States*, 199 Ct. Cl. 1014 (1972). Hardship entailed by the bond requirement is insufficient excuse, without more, for noncompliance. Nor can it properly claim that we are not proceeding with a case or controversy under article III when it has given us just that which it now says is lacking, and we are only proceeding in an ancillary, collateral way without prejudice to the merits of plaintiff's principal claim.

U.S. GOVERNMENT PRINTING OFFICE: 1976

APPENDIX B

Order of the Renegotiation Board
Order Determining Excessive Profits

WHEREAS:

A. A renegotiation proceeding was heretofore duly commenced by or on behalf of the Renegotiation Board pursuant to the Renegotiation Act of 1951, as amended (hereinafter referred to as "the Act"), with SOLITRON DEVICES, INC., a New York corporation

(hereinafter referred to as "the Contractor"), with respect to the fiscal year of the Contractor ended February 28, 1967 which said proceeding was assigned to and conducted by the Eastern Regional Renegotiation Board.

B. Said regional board recommended a determination that the sum of Three Million Two Hundred Thousand ...

.....

Dollars ($3,200,000) represented the portion of the profits of the Contractor from contracts and subcontracts subject to the Act for said fiscal year which was excessive within the meaning of the Act. The Renegotiation Board thereafter reassigned the case to itself.

C. The Contractor has been afforded full opportunity to submit all pertinent financial, operating and other data, and due consideration has been given thereto in accordance with the Act and the Renegotiation Board Regulations promulgated pursuant to the Act.

D. The Contractor has been afforded an opportunity, but has declined, to enter into an agreement for the elimination of excessive profits in the amount hereinafter stated.

NOW, THEREFORE, it is hereby:

1. DETERMINED as a result of such renegotiation that the Contractor realized excessive profits in the amount of Five Hundred Thousand .....

..... Dollars ($500,000) from contracts and subcontracts subject to the Act for its said fiscal year.

2. FURTHER DETERMINED that, after proper adjustment on account of the taxes measured by income, other than Federal taxes, which are attributable to the portion of the profits of the Contractor which is not excessive, the amount of excessive profits to be eliminated is Four Hundred Ninety-one Thousand One Hundred Twelve .... Dollars ($491,112).

3. ORDERED that such excessive profits, as so adjusted in the amount of Four Hundred Ninety-one Thousand One Hundred Twelve ..... Dollars ($491,112) be eliminated pursuant to the Act and said Renegotiation Board Regulations, subject to the applicable tax credit, if any, for Federal income taxes provided in Section 1481 of the Internal Revenue Code of 1954.

THE RENEGOTIATION BOARD

By (signed) REX M. MATTINGLY

Dated, issued and
entered on: Jan. 24, 1975

APPENDIX C

Statutes and Constitutional Provisions Involved

Section 105(a) and (b)(1)-(3) of the Renegotiation Act of 1951, as amended. 65 Stat. 7 *et seq.*, 68 Stat. 1116, 1118, 70 Stat. 787, 74 Stat. 202, 76 Stat. 134, 82 Stat. 1345, 85 Stat. 97, 98, 50 U.S.C.App. §§ 1215(a), (b)(1)-(3) provides as follows:

50 U.S.C.App. § 1215.

(a) Renegotiation proceedings shall be commenced by the mailing of notice to that effect, in such form as may be prescribed by regulation, by registered mail or by certified mail to the contractor or subcontractor. The Board shall endeavor to make an agreement with the contractor or subcontractor with respect to the elimination of excessive profits received or accrued, and with respect to such other matters relating thereto as the Board deems advisable. Any such agreement, if made, may, with the consent of the contractor or subcontractor, also include provisions with respect to the elimination of excessive profits likely to be received or accrued. If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail or by certified mail to the contractor or subcontractor. In the absence of the filing of a petition with the Court of Claims under the provisions of and within the time limit prescribed in section 108 [section 1218 of this Appendix], such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. The Board shall exercise its powers with respect to the aggregate of the amounts received or accrued during the fiscal year (or such other period as may be fixed by mutual

agreement) by a contractor or subcontractor under contracts with the Departments and subcontracts, and not separately with respect to amounts received or accrued under separate contracts with the Departments or subcontracts, except that the Board may exercise such powers separately with respect to amounts received or accrued by the contractor or subcontractor under any one or more separate contracts with the Departments or subcontracts at the request of the contractor or subcontractor. By agreement with any contractor or subcontractor, and pursuant to regulations promulgated by it, the Board may in its discretion conduct renegotiation on a consolidated basis in order properly to reflect excessive profits of two or more related contractors or subcontractors. Renegotiation shall be conducted on a consolidated basis with a parent and its subsidiary corporations which constitute an affiliated group under section 141(d) of the Internal Revenue Code [section 141(d) of Title 26] if all of the corporations included in such affiliated group request renegotiation on such basis and consent to such regulations as the Board shall prescribe with respect to (1) the determination and elimination of excessive profits of such affiliated group, and (2) the determination of the amount of the excessive profits of such affiliated group allocable, for the purposes of section 3806 of the Internal Revenue Code [section 3806 of Title 26], to each corporation included in such affiliated group. Whenever the Board makes a determination with respect to the amount of excessive profits, and such determination is made by order, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination. Such statement shall not be used in the Court of Claims as proof of the facts or conclusions stated therein.

(b) (1) *General procedures.* Upon the making of an agreement, or the entry of an order, under subsection (a) of this section by the Board, or the entry of an order under section 108 [section 1218 of this Appendix] by the Court of Claims, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries or any of them to eliminate such excessive profits—

(A) by reductions in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms;

(B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits;

(C) by directing any person having a contract with any agency of the Government, or any subcontractor thereunder, to withhold for the account of the United States from any amounts otherwise due from such person or such subcontractor to a contractor, or subcontractor, having excessive profits to be eliminated, and every such person or subcontractor receiving such direction shall withhold and pay over to the United States the amounts so required to be withheld;

(D) by recovery from the contractor or subcontractor, or from any person or subcontrator directed under subparagraph (C) [of this subsection] to withhold for the account of the United States, through payment, repayment, credit, or suit any amount of such excessive profits realized by the contractor or subcontractor or directed under subparagrph (C) [of this subsection] to be withheld for the account of the United States; or

(E) by any combination of these methods, as is deemed desirable.

(2) *Interest.* Interest at the rate per annum determined pursuant to the next to the last sentence of this paragraph for the period which includes the date on which interest begins to run shall accrue and be paid on the amount of such excessive profits from the thirtieth day after the date of the order of the Board or from the date fixed for repayment by the agreement with the contractor or subcontractor to the date of repayment, and on amounts required to be withheld by any person or subcontractor for the account of the United States pursuant to paragraph (1)(C) [of this subsection], from the date payment is demanded by the Secretaries or any of them to the date of payment. When the Court of Claims, under section 108 [section 1218 of this Appendix], redetermines the amount of excessive profits received or accrued by a contractor or subcontractor, interest at the rate per annum determined pursuant to the next to the last sentence of this paragraph for the period which includes the date on which interest begins to run shall accrue and be paid by such contractor or subcontractor as follows:

(A) When the amount of excessive profits determined by the Court of Claims is greater than the amount determined by the Board, interest shall accrue and be paid on the amount determined by the Board from the thirtieth day after the date of the order of the Board to the date of repayment and, in addition thereto, interest at the same rate shall accrue and be paid on the additional amount determined by the Court of Claims from the date of its order determining such excessive profits to the date of repayment.

(B) When the amount of excessive profits determined by the Court of Claims is equal to the amount determined by the Board, interest shall accrue and be paid on such amount from the thirtieth day after

the date of the order of the Board to the date of repayment.

(C) When the amount of excessive profits determined by the Court of Claims is less than the amount determined by the Board, interest shall accrue and be paid on such lesser amount from the thirtieth day after the date of the order of the Board to the date of repayment, except that no interest shall accrue or be payable on such lesser amount if such lesser amount is not in excess of an amount which the contractor or subcontractor tendered in payment prior to the issuance of the order of the Board.

Interest shall accrue and be paid at a rate which the Secretary of the Treasury shall specify as applicable to the period beginning on July 1, 1971, and ending on December 31, 1971, and to each six-month period thereafter. Such rate shall be determined by the Secretary of the Treasury, taking into consideration current private commercial rates of interest for new loans maturing in approximately five years.

(3) *Suits for recovery.* Actions on behalf of the United States may be brought in the appropriate courts of the United States to recover, (A) from the contractor or subcontractor, any amount of such excessive profits and accrued interest not withheld or eliminated by some other method under this subsection, and (B) from any person or subcontractor who has been directed under paragrph (1)(C) of this subsection to withhold for the account of the United States, the amounts required to be withheld under such paragraph, together with accrued interest thereon.

Sections 108 and 108A of the Renegotiation Act of 1951 as amended 65 Stat. 7 *et seq.*, 70 Stat. 791, 76 Stat. 134, 85

Stat. 97, 98, U.S.C. App. § 1218 and 1218a provide as follows:

§ 1218.

Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may—

(a) if the case was conducted initially by the Board itself—within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing under section 105(a) [section 1215(a) of this Appendix] of the notice of such order, or

(b) if the case is not conducted initially by the Board itself—within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing under section 107(c) [section 1217(c) of this Appendix] of the notice of the decision of the Board not to review the case or the notice of the order of the Board determining the amount of excessive profits,

file a petition with the Court of Claims for a redetermination thereof. Upon such filing, such court shall have exclusive jurisdiction, by order, to determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency except as provided in section 108A [section 1218a of this Appendix]. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Court of Claims to finally determine the amount,

if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. In the case of any witness for the Board, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board available for that purpose, and in the case of any other witnesses shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this section shall operate to stay the execution of the order of the Board under subsection (b) of section 105 [section 1215(b) of this Appendix] only if within ten days after the filing of the petition the petitioner files with the Court of Claims a good and sufficient bond, approved by such court, in such amount as may be fixed by the court. Any amount collected by the United States under an order of the Board in excess of the amount found to be due under a determination of excessive profits by the Court of Claims shall be refunded to the contractor or subcontractor with interest thereon from the date of collection by the United States to the date of refund at the rate per annum determined pursuant to the next to the last sentence of section 105(b)(2) [section 1215(b)(2) of this Appendix] for the period which includes the date on which interest begins to run.

§ 1218a. Review of Court of Claims decisions

The decisions of the Court of Claims under section 108 [section 1218 of this Appendix] shall be subject to review by the Supreme Court upon certiorari in the manner provided in section 1255 of Title 28 for the review of other cases in the Court of Claims.

28 U.S.C. § 2508 provides as follows:

§ 2508.

Upon the trial of any suit in the Court of Claims in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the United States against any plaintiff making claim against the United States in said court, the court shall hear and determine such claim or demand both for and against the United States and plaintiff.

If upon the whole case it finds that the plaintiff is indebted to the United States it shall render judgment to that effect, and such judgment shall be final and reviewable.

The transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records and shall be enforceable as other judgments.

Article III, the United States Constitution provides in pertinent part as follows:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United

States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * *

The Fifth Amendment of the United States Constitution provides in pertinent part as follows:

No person shall * * * be deprived of life, liberty or property without due process of law.* * *

Supreme Court, U. S.
FILED
MAR 2 1977
MICHAEL RODAK, JR., CLERK

No. 76-671

In the Supreme Court of the United States

OCTOBER TERM, 1976

SOLITRON DEVICES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

IRVING JAFFE,
Acting Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-671

SOLITRON DEVICES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Renegotiation Act authorizes the Court of Claims to enter a judgment in aid of execution of an order of the Renegotiation Board pending final redetermination in that court, when the party requesting redetermination has failed to file a bond as required by the Act.

2. If so, whether the Act violates either Article III of the Constitution or the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution and of the Renegotiation Act of 1951, 65 Stat. 7, as

amended, 50 U.S.C. App. (and Supp. V) 1211 *et seq.*, are set forth at Pet. App. C, pp. 19-27.

STATEMENT

Petitioner Solitron Devices, Inc., is a corporation engaged in the manufacture of solid state semiconductor devices. Part of its business has been government defense contracts subject to the Renegotiation Act of 1951, as amended, 50 U.S.C. App. (and Supp. V) 1211 *et seq.* (Pet. App. 2).

Under the authority granted to it by the Act (50 U.S.C. App. 1215), the Renegotiation Board determined that petitioner had realized excessive profits on contracts for four successive fiscal years, the last of which ended in February 1970. The Board ordered petitioner to pay back to the government approximately three million dollars, the amount of profits determined to be excessive. Petitioner thereupon filed a petition in the Court of Claims for *de novo* determination of excessive profits (see 50 U.S.C. App. (Supp. V) 1218). The government filed a mandatory counterclaim for the amounts awarded by the Board.

Under 50 U.S.C. App. (Supp. V) 1218, a petition for redetermination by the Court of Claims does not stay execution of the order of the Board unless a bond in an amount set by the Court of Claims is filed within ten days of the filing of the petition.[1] In this case, petitioner did not file the required bond. The government accordingly proceeded on its counterclaim to seek a judgment in aid of execution. The Court of Claims (*en banc*) entered such a judgment

[1]The recent practice of the Court of Claims is to require a bond in the exact amount of the order of the Renegotiation Board. See *Manufacturers Service Co.* v. *United States*, 518 F. 2d 1202. But cf. Pet. App. 6-7, 11.

(Pet. App. 1-15). As the court explained (Pet. App. 3), "[i]f recovery is had on such a judgment * * * it will not prevent [petitioner] from continuing to prosecute its litigation here, and if successful, it could of course recover with interest refunds to the extent necessary to effectuate our redetermination."[2]

ARGUMENT

1. Petitioner contends that the Court of Claims has no authority to enter a *pendente lite* judgment in aid of execution upon a petitioner's failure to file a bond as required by the Act. The Court of Claims correctly has consistently rejected this claim. *E.g., Sandnes' Sons, Inc.* v. *United States*, 462 F. 2d 1388; *O'Brien Gear & Machine Co.* v. *United States*, 199 Ct.Cl. 1014; *Manufacturers Service Co.* v. *United States*, 518 F. 2d 1202; *Bannercraft Clothing Co.* v. *United States*, 518 F. 2d 605.

The Act provides in pertinent part that "[t]he filing of a petition [with the Court of Claims] shall operate to stay the execution of the order of the Board * * * only if within ten days after the filing of the petition the petitioner files with the Court of Claims a good and sufficient bond, approved

[2]On December 16, 1976, subsequent to the entry of judgment in aid of execution, petitioner entered into a security agreement with the government providing for monthly payments of the excessive profits as determined by the Board, pending the outcome of the litigation. The amounts of the payments were determined by an outside expert to be both sufficient to eliminate the excessive profits as determined and compatible with petitioner's continued solvent operation, and the agreement provides that should the sums paid by petitioner exceed the amount ultimately determined to be due by the Court of Claims, the excess is to be refunded with interest at 8 ⅞ percent per annum (see 50 U.S.C. App. (Supp. V) 1218). We are lodging a copy of the security agreement with the Clerk of this Court.

by such court * * *." 50 U.S.C. App. (Supp. V) 1218.[3] Unless stayed in this manner, execution of the Board's order is to proceed "forthwith" by having the Board direct the service Secretaries to withhold current payment to the extent of the excessive profits (50 U.S.C. App. 1215(b)(1)) or by instituting an action in the "appropriate court[ ]" (50 U.S.C. App. 1215(b)(3)).

As the Court of Claims explained (Pet. App. 4), prior to 1971 redetermination and collection involved "two entirely different court procedures." Redetermination occurred in the Tax Court (65 Stat. 21), but that court was not an "appropriate court[ ]" for the purpose of an action to collect on the Board's order. Such actions were always in the district courts (see *Sandnes' Sons, Inc.* v. *United States, supra,* 462 F. 2d at 1390), although such courts had no authority to redetermine the amount of excessive profits (*ibid.*). If execution of the Board's order was not stayed, the district court's role was to assist in the collection of excessive profits, pending final redetermination by the Tax Court (*ibid.*; see *Hermetic Seal Products Co.* v. *United States,* 307 F. 2d 809 (C.A. 1)).[4]

In 1971, authority to redetermine was transferred from the Tax Court to the Court of Claims. Renegotiation Act of July 1, 1971, Pub. L. 92-41, 85 Stat. 97. A consequence of this transfer is that redetermination and collection can now proceed in the same court, since the Court of Claims can

[3]If no petition for redetermination is filed with the Court of Claims, the Board's order becomes final and nonreviewable. 50 U.S.C. App. (Supp. V) 1215(a); cf. *Lichter* v. *United States,* 334 U.S. 742.

[4]Prior to 1951, the predecessor Renegotiation Act expressly provided that a petition for redetermination in the Tax Court "shall not * * * stay the execution of the order of the Board * * *" (58 Stat. 87). The provision enabling a contractor to stay execution by filing a bond was added in 1951 (65 Stat. 22).

assist in the latter process by way of offset (28 U.S.C. 1503), or counterclaim (28 U.S.C. 2508).[5] Indeed, in *Sandnes' Sons, Inc.* v. *United States, supra,* 462 F. 2d at 1390-1391, the Court of Claims held that a claim by the government for assistance in the execution of the Board's order is a compulsory counterclaim to a petition for redetermination.

Against this background, it seems plain that the Court of Claims has authority under the Act to enter a *pendente lite* judgment in aid of execution in the circumstances of this case.[6] The government's counterclaim in the Court of

[5]Petitioner points out (Pet. 15-16) that 28 U.S.C. 2508 refers only to the authority of the Court of Claims to render a "final and reviewable" judgment "[i]f upon the whole case [the court] finds that the plaintiff is indebted to the United States." But 28 U.S.C. 2508 was enacted before the Court of Claims was given jurisdiction to redetermine orders of the Renegotiation Board and it therefore should not be construed as precluding the *pendente lite* relief that is so plainly contemplated by the Renegotiation Act. As the Court of Claims stated in *Sandnes' Sons* (462 F. 2d at 1391): "[the Renegotiation Act] is free from ambiguity and can only mean that the Government normally is entitled to our assistance in executing the order of the Board at once upon the filing of a petition without a bond." The court in *Sandnes' Sons* rejected the argument petitioner makes here, stating that (462 F. 2d at 1391): "This general language [28 U.S.C. 2508], * * * enacted long before we had renegotiation jurisdiction, must yield to specific language enacted especially for renegotiation cases."

[6]Contrary to petitioner (Pet. 10-11), such authority is not inconsistent with this Court's decision in *Renegotiation Board* v. *Bannercraft Co.,* 415 U.S. 1. *Bannercraft* concerned a contractor's rights under the Freedom of Information Act to enjoin Renegotiation Board proceedings; it has no bearing upon the totally different issue presented here. Petitioner relies (Pet. 10) upon this Court's observation in *Bannercraft* that "a contractor does not become obligated to remit excessive profits until termination of the Court of Claims suit, if it elects that course" (415 U.S. at 23). But an essential ingredient of the election to which the Court referred is the filing of a bond pending redetermination; since petitioner chose not to file that bond, it did not "elect" to postpone payment within the meaning of the Court's discussion.

Claims seeks execution of the Board's order. Execution is stayed "only if * * * petitioner files * * * a good and sufficient bond * * *" (50 U.S.C. App. (Supp. V) 1218). "[B]y an obvious negative pregnant, with no bond, collection by any available means, including suits * * *, is not stayed" (Pet. App. 5).[7]

2. Petitioner also contends (Pet. 17-23) that the Act, if construed as authorizing the Court of Claims to enter a *pendente lite* judgment in aid of execution, violates Article III of the Constitution or the Due Process Clause of the Fifth Amendment. This contention is insubstantial.

a. With respect to Article III, petitioner contends that a court may not enter an order without a finding of fact, and it submits that that is what the Court of Claims did here. This contention fails for the obvious reason that the court did make findings—*inter alia*, that the Board had entered an order against petitioner and that petitioner had failed to file a bond to suspend execution of that order (see Pet. App. 14)—and that those findings were a sufficient basis for the entry of a *pendente lite* order. Apparently petitioner seeks to characterize the Court of Claims as merely rubber stamping the Board's order, but such a characterization is wide of the mark. The Court of Claims has not given conclusive effect to the determination of the Renegotiation Board; it will proceed to determine the amount of excessive profits *de*

[7]As petitioner states (Pet. 14 n. 14), one district court in 1953 did hold that the Renegotiation Act does not authorize a court to enter a judgment against a contractor without a determination of the merits. *United States* v. *Miller*, 111 F. Supp. 368 (E.D. Mich.). But after that decision, Congress amended the Act to add the word "only" to 50 U.S.C. App. 1218: "The filing of a petition * * * shall * * * stay the execution of the order of the Board * * * *only* if * * * the petitioner files * * * a * * * bond * * *" (see 70 Stat. 791). The amendment removes any doubt as to Congress' intention regarding the government's right expeditiously to execute on the Board's orders when no bond has been filed.

novo. 50 U.S.C. App. (Supp. V) 1218; see *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 23-24. All the court has done so far is to protect the United States against loss pending disposition of petitioner's claim. The issuance of such a protective order *pendente lite* is well within the judicial function, and no case cited by petitioner is to the contrary.[8]

b. The entry of the *pendente lite* order in this case does not deprive petitioner of due process. Petitioner contends that it would be irreparably injured by the government's enforcement of the judgment (Pet. 7)[9] and that it is therefore entitled by the Due Process Clause of the Fifth Amendment to "some kind of predeprivation or prompt post-deprivation hearing" (Pet. 21, quoting *Commissioner* v. *Shapiro*, 424 U.S. 614, 629). But petitioner received a "predeprivation" hearing: the extensive proceedings before the Renegotiation Board themselves amply satisfy the requirements of due

[8]In the absence of the filing of a petition with the Court of Claims, an order of the Renegotiation Board is "final and conclusive and shall not be subject to review * * *." 50 U.S.C. App. (Supp. V) 1215(a). Orders of the Board that have become final in this manner may be enforced in the "appropriate court[ ]" (50 U.S.C. App. 1215(b)(3)) without further consideration of matters that might have been presented in a petition for redetermination. In *Lichter* v. *United States*, 334 U.S. 742, this Court approved this statutory scheme. Although the Court in *Lichter* did not give explicit consideration to Article III, the propriety of the *pendente lite* order here would appear to follow *a fortiori* from the Court's decision in that case.

[9]After the petition for a writ of certiorari was filed in this case, the parties entered into a security agreement providing for the payment of petitioner's liability in installments, in exchange for the government's agreement to refrain from exercising its right to obtain immediate execution of the Board's order. See note 2, *supra*. This agreement significantly reduces "the probability of irreparable injury" (*North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 608), and "the risk of an erroneous deprivation" of petitioner's property (*Mathews* v. *Eldridge*, 424 U.S. 319, 335).

process. The procedures followed by the Board in determining excessive profits were described by the Court in *Renegotiation Board* v. *Bannercraft Co., supra,* 415 U.S. at 15- 16:

> The renegotiation process itself is initiated by notice to the contractor and by assignment of the contractor's report to the appropriate Regional Board. * * * Personnel of the Regional Board then prepare a "Report of Renegotiation" which includes a "recommendation with respect to the amount, if any, of excessive profits for the fiscal year under review." * * * This is only the first of several steps within the agency structure. Thereafter the statement is reviewed, successively, by a panel of the Regional Board, by the Regional Board itself, and finally by the Renegotiation Board. At each level there is consultation with the contractor, the preparation of a report and analysis, and submission to the next higher level of a recommendation as to excessive profits. * * * At each stage, the contractor is entitled to a statement of the basis for the recommendation. Each level is free to make new findings and no level is bound by the determination of the level below; the recommended settlement may decrease or increase at each level. * * *

These procedures were followed in this case (see Pet. App. 17). The Board conducted lengthy financial and accounting investigations, and met with petitioner several times to hear and consider its arguments why profits during the years in issue had not been excessive. After considering the matter the Board issued a proposed opinion setting forth its findings and conclusions. There were further discussions,

and only then, after the Board and petitioner could not reach an agreement, did the Board issue its final opinion.[10]

Moreover, under the Act the execution of an order of the Board requires considerable involvement by the Court of Claims. The court has authority under the Act (50 U.S.C. App. (Supp. V) 1218) to fix and approve the bond that is required for the stay of execution. The court also has the opportunity to determine, at the time it is considering the government's motion for *pendente lite* judgment, "whether the board's orders were entered against the proper party, whether the procedures followed in entering the board orders were lawful, whether [petitioner] has paid the amount claimed by the board to be due, [and] whether it has in fact posted the required bond to stay * * *" (Pet. App. 14; see *id.* at 10-11).

The proceedings before the Board, when coupled with the judicial supervision of the collection process, fully satisfy the requirements of due process.[11] See *Mathews* v. *Eldridge,* 424 U.S. 319;[12] cf. *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600.

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[10]We are lodging a copy of the Board's opinion with the Clerk of this Court.

[11]This case is plainly distinguishable from *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U.S. 601, upon which petitioner principally relies (Pet. 22-23). There the Court invalidated a garnishment procedure that made no provision for notice or an opportunity for an early hearing. Unlike the situation in that case, the order here, "considering the Board's statutory independence * * *, the elaborate procedure it follows according to law and regulations, and its internal appeals * * *" (Pet. App. 10), is "more than a private creditor's *ipse dixit*" (*ibid.*).

[12]As the Court pointed out in *Eldridge* (424 U.S. at 335), the government's interest also is to be weighed in the balance to determine the requirements of due process in a particular context. Here the government's interest—either in collecting the amount of excessive profits promptly or in being adequately secured during litigation— is substantial. If neither the posting of a bond nor the payment of the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1977.

Board's award were required pending redetermination by the Court of Claims, contractors would have the opportunity to dissipate their assets and would be encouraged to extend the court proceedings in order to delay the time when final payment becomes due. See Pet. App. 5, 10. See also *Lichter* v. *United States*, 334 U.S. 742; *Renegotiation Board* v. *Bannercraft Co., supra.*

reply brief

Supreme Court, U. S.
FILED
MAR 15 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-671

SOLITRON DEVICES, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Claims

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I. The Government would avoid the authority of *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, by dismissing as dictum this Court's discussion of the nature of the proceedings in the Court of Claims (*id.* at 23-24), and then reading something into the opinion which is not there. (Gov't Br. p. 5, n.6)

The proposition that "[t]he contractor may institute its *de novo* proceeding in the Court of Claims, unfettered by any prejudice from the agency proceeding and free from any claim that the Board's determination is supported by substantial evidence" (*id.* at 23), was necessary to the decision of Bannercraft's Free-

dom of Information Act suit to enjoin a pending Board proceeding. For, on the Court's analysis of the FOIA, the result turned on the "nature of the renegotiation process" (*id.* at 20), including the absence of irreparable injury to the contractor (*id.* at 23-24); this depended on the fact "that a contractor does not become obligated to remit excessive profits until termination of the Court of Claims suit, if it elects that course" (*id.* at 23). When the Government says that "an essential ingredient of the election to which the Court referred is the filing of a bond pending redetermination" (Gov't. Br. 5), it expresses a limitation which is nowhere to be found in the *Bannercraft* opinion, and which misreads the words that are there.

The phrase "elects that course" (415 U.S. at 23) refers to the institution of renegotiation proceedings, and even under the Government's theory the filing of a bond is not a condition precedent to invoking the Court of Claims' jurisdiction. Moreover, if this Court had been apprised of the contention that at the conclusion of the renegotiation proceedings the Government would be entitled to a judgment in aid of execution by the Court of Claims in the amount of the Renegotiation Board's order, the result in *Bannercraft* might well have been different. *Bannercraft* was decided (by a 5-4 vote) on the proposition that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury" (*id.*, at 24). But an order which results in a judgment in aid of execution, prior to a "*de novo* hearing in the Court of Claims" does far more than impose "[m]ere litigation expense".

We think that if the Government had been confident that *Bannercraft* is genuinely distinguishable, it would

not have relegated to a footnote a matter of such obvious importance to the certworthiness of this case.

Even if this were a matter of first impression, the Court of Claims' interpretation of the Act would be incorrect (see Pet. 11-17). The Government itself reads the statute as providing that in the absence of a bond, "execution of the Board's order is to proceed 'forthwith' * * * or by instituting an action in the 'appropriate court[ ]' (50 U.S.C. App. 1215(b)(3))" (Gov't. Br. 4). But "instituting an action" differs mightily from obtaining a judgment in aid of execution before a resolution of the merits of that action. Moreover, the Government cites nothing in support of the proposition that the 1971 change of jurisdiction from the Tax Court to the Court of Claims evinced disapproval of the District Court decision in *Miller* (Gov't. Br. 6, n. 7); nor did the Government make such a showing below. Finally, the Government understates the Court of Claims' construction of the Act, which is not "that the Court of Claims has *authority* under the Act to enter a pendente lite judgment in aid of execution *in the circumstances of this case*" (Gov't. Br. 5, emphasis added), but rather is that

> "where a 100 percent bond is not timely filed, the Government possesses an immediate right to seek a judgment in aid of execution. Such judgment will be granted absent some compelling showing of unusual or mitigating circumstances."[1]

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[1] *Manufacturers Service Co., Inc.* v. *United States*, 518 F.2d 1202, 1208 (Ct. Cl.). No such showing has ever been made to the Court of Claims' satisfaction. See Pet. App. 6, discussing *Sandnes'*, the only case in which the Court even directed a hearing to determine whether "unusual or mitigating circumstances" existed.

Given the Court of Claims' understanding of its duty it is entirely correct to characterize its judgment in aid of execution "as merely rubber stamping the Board's order" (Gov't. Br. 6). We fully agree that the "entry of an order *pendente lite* is well within the judicial function" (*Id.*). But in order to qualify as a constitutionally sufficient judicial exercise of that function, more is required than the automatic issuance of a judgment after finding only that an order has been entered by a Governmental agency, and that a bond in the full amount of that order has not been deposited by a party. (*Id.* 6) At the very least, the question of judicial independence raised by the Court of Claims' view is of sufficient substance and importance to warrant this Court's concern.

On the due process issue, the Government contends that "petitioner received a 'predeprivation' hearing" as required by *Commissioner* v. *Shapiro,* 424 U.S. 614, 629 (Gov't. Br. 7). But the statutory procedures before the Renegotiation Board do not qualify as a "hearing" in the constitutional sense; that is not their function. As was said in *Bannercraft:* "The character and the entire atmosphere of the [Renegotiation Board] process is negotiation—that is, renegotiation—of an existing contract." 415 U.S. at 21. And the "considerable involvement by the Court of Claims" (Gov't. Br. 9) in no way even approximates what this Court's decisions require prior to the seizing of a person's property. See Pet. 21-23.

The substantiality and importance of the due process issue is further demonstrated by the recent decision of the Ninth Circuit in *United States* v. *Vertol H21C, etc.,* (*Aviation Contractors, Inc.*) 545 F.2d 648

(Nov. 1, 1976), reported after the Petition herein was filed.

In that case, the Federal Aviation Administration, on a warrant issued by the Clerk of Court, seized a helicopter belonging to Aviation Contractors as security for $6,000 civil penalties which the FAA believed should be assessed for violation of FAA regulations relating to helicopters. The Court of Appeals held that this seizure denied Aviation due process of law. The Court held that the private interest in not having the helicopter seized was "substantial" in light of "the trial court's finding that the government 'effectively paralyzed' " claimant's business by seizing the helicopter", and that "deprivation certainly rivals in severity the seizure of various types of consumer products." *Id.* at 651. Contrast the Court of Claims' opinion, which regards the seizure of a television set from an installment buyer as more worthy of procedural protection than Solitron's $3.8 million. See Pet. App. 11 and Pet. 25, n. 21.

The Ninth Circuit's decision also differs significantly from that of the Court of Claims in evaluating the Government's interest there is a close analogy between civil penalties claimed by the FAA against Aviation Contractors, and the Government's effort to recapture excess profits. The Ninth Circuit held that in the former situation the rule of *Phillips* v. *Commissioner,* 283 U.S. 589, which authorizes summary proceedings to insure the collection of taxes, is not applicable, 545 F.2d at 651; yet, the Court of Claims held that *Phillips* justified summary execution of the orders of the Renegotiation Board. See *Sandnes',* 462 F.2d 1388, 1392. These divergent views of the scope

of *Phillips* independently merit this Court's attention, particularly in light of *Shapiro, supra.*

II. The Agreement entered into between these parties well illustrates the practical consequences of the Court of Claims' interpretation of the Renegotiation Act, and the general importance of this case in the interpretation of that Act—which, indeed, the Government does not dispute. The Agreement recites, *inter alia:*

> "WHEREAS, payment of said Judgment [of the Court of Claims] or Orders of the Renegotiation Board by Solitron in full as indicated in the Report of Dr. Edward J. Mock to the Department of Justice dated July 7, 1976, would inflict irreparable injury to Solitron's continued operations, and for that reason, Solitron has offered to secure the United States on account of the amount which may ultimately be determined to be due the United States in the pending action, by agreeing to make monthly payments to the Department of the Army in the amounts recommended in the Report of Dr. Edward J. Mock, aforesaid; the agreement to make such monthly payments to be secured by First and Second Mortgages on real estate owned by Solitron."[2]

In addition to mortgaging its real estate in favor of the Government, Solitron is required to pay $42,000 per month for the first year, $67,000 per month for the next two years, $36,500 per month for the next year and the balance in monthly installments during the fifth year, totalling the entire amount of the Court of Claims' judgment plus interest at 8⅞%. The Government is entitled to execution on 10 days' notice in event of default of any payment of more than 20 days.

[2] P. 3 of the Agreement, which the Government has lodged with the Court.

This agreement is significant in two respects: First, it demonstrates by an independent source that the payment of the judgment would inflict irreparable injury on Solitron, thus, plainly bringing this case within the due process precedents on which the petition relied, and which were followed by the Ninth Circuit.

Second, it confirms the statement in our petition that the Court of Claims' interpretation of the Renegotiation Act greatly enhances the Government's bargaining power. The Court of Claims' judgment puts the business of the contractor at the mercy of the Government. The self-help procedures allowed by § 1215(b)(1) only enable the Government to withhold other monies due the contractor or to require others who do business with the Government to withhold monies; but the judgment allows the Government to levy on all contractors' assets. In *Manufacturers Service Co., Inc., supra,* the Court of Claims recognized the power that it was granting the Government: "It is defendant's responsibility to use the judgment wisely * * *" and added that "we as a court must presume that the Government will act in good faith and in the public interest" (518 F.2d at 1208). We do not dispute the Government's "good faith" or that its representative believe that the Agreement which they imposed on Solitron is in the public interest. But we believe that the statute does not contemplate and the Fifth Amendment does not permit private property to be thus subject to the "good faith" judgments of executive officers; rather they contemplate a judicial hearing before such property is seized.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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